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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86185707
Applicant	Fuel Industries Inc.
Applied for Mark	BRODDCAST
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Date	12/28/2015

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re U.S. Trademark Application)	
)	
Applicant: Fuel Industries, Inc.)	Examining Attorney: Raul Cordova
)	
Serial No.: 86/185,707)	Law Office: 114
)	
Filed: February 5, 2014)	Our Ref. No.: 136252.012100
)	
Mark: BRODDCAST)	

APPLICANT'S REPLY BRIEF

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I. Introduction

Applicant Fuel Industries, Inc. (“Applicant”) submits this Reply Brief in response to the Examining Attorney’s Appeal Brief dated November 24, 2015, and requests favorable consideration of the arguments presented.

II. Applicant’s Mark is Not *Merely* Descriptive of Its Goods

The Examiner states that Applicant’s BRODDCAST mark is descriptive because the term is phonetically identical to the word “broadcast,” which he maintains is a common term used “in the trade” and, therefore, viewers of the mark would have a “clear concept of the nature of the goods being offered.” This is simply inaccurate.

First, a word that is phonetically identical to another word does not mean that the mark is merely descriptive. *See, e.g., In re Grand Metropolitan Foodservice, Inc.*, 30 USPQ2d 1974, 1975 (TTAB 1994)(MUFFUNS not merely descriptive); *In re Tea and Sympathy, Inc.*, Ser. No. 77/054,914 (T.T.A.B. 2008) (THE FARMACY not merely descriptive) [precedential opinion]; *In re Michael W. Arlen*, Ser. Nos. 85/135,800 and 85/180,298 (T.T.A.B. 2012) (NEWTRITIOUS and NEWTRITION not merely descriptive)[not precedential].

Second, even if the word “broadcast” is commonly used “in the trade” in television or radio, Applicant’s product has nothing to do with such trades. Applicant’s product is a digital content creation tool for children and not intended for television or radio broadcasting as understood by the public.

Third, even assuming a consumer would automatically associate the mark BRODDCAST with the word “broadcast,” this does not render the mark merely descriptive. A mark is “merely descriptive” if it *serves no other purpose or function than to describe the goods*. *In re Quick-Print Copy Shop, Inc.*, 205 USPQ 505, 507 (CCPA 1980)(holding that merely descriptive means “only” descriptive). Therefore, in categorizing trademarks, the inquiry is not whether the mark is descriptive, but whether the mark is *merely* descriptive with respect to such goods.

Here, again, even assuming *arguendo* that a consumer would automatically associate BRODDCAST to mean “broadcast,” the wording “broadcast” cannot be deemed *merely* descriptive of Applicant’s goods, namely, “multimedia software for digital content creation of entertainment videos using electronic media; multimedia software for digital video recording, editing and playback of videos; multimedia software for digital recording, editing and playback of entertainment videos; downloadable software for digital recording, editing and playback of entertainment videos” (the “Applicant’s Goods”). The word “broadcast” as defined by the Examiner’s evidence, generally means: i) made public by means of radio or television; ii) of or relating to radio or television broadcasting; and iii) to send out (signals, programs, etc.) by radio or television. Synonyms for “broadcast” include the words: spread, circulate, disseminate, and propagate. *See* attachments to Office Action dated May 20, 2014. There is nothing contained in Applicant’s Goods to indicate that the product is for radio or television, or, for circulating or disseminating.

The Examiner appears to be focused entirely on the “playback” feature of Applicant’s Goods and asserts that this is “broadcasting” over a network. This is an overreach in the reading and interpretation of Applicant’s Goods and is far too attenuated to support such a conclusion. The fact that Applicant’s Goods includes a playback option has nothing to do with broadcasting. Again, Applicant’s product is a digital content creation tool that allows recording, editing, and playback of videos. The fact that the videos can be played back on one’s device or sent to someone in a text message or uploaded to YouTube or Facebook does not constitute a “broadcasting” in the traditional and commonly understood sense of this word. A playback is not equivalent to a dissemination and does not constitute a broadcasting. Applicant’s Mark cannot be considered *merely* descriptive of the goods.

Finally, it is well settled that unless a mark gives *reasonably accurate* knowledge of the characteristics of a product or service, the mark does not fall within the trademark law definition of descriptiveness. *Blisscraft of Hollywood v. United Plastics Co.*, 131 USPQ 55 (2d Cir. 1961). In

other words, in order to be labeled “descriptive,” a word or phrase must give some “reasonably accurate” or “tolerably distinct” knowledge... as to what that product is made of.” *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 699 (2d Cir. 1961). If, by contrast, a consumer is required to “use imagination or any type of multistage reasoning to understand the mark’s significance,” the mark is considered suggestive rather than descriptive. *Zobmondo Entm’t, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1114 (9th Circ. 2010). Here, again assuming a consumer would associate the mark BRODDCAST with the word “broadcast,” he or she would associate such a word to mean a dissemination over radio or television, which is not what Applicant’s product does.

III. The Examiner Did Not Meet His Burden

The Examining Attorney bears the burden of showing that a mark is merely descriptive of the relevant goods or services. *See In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). The Examiner submitted definitions for the wording “broadcast” and also argued that the evidence of record “establishes that broadcasting software is a critical element to develop programs for broadcasting.” Even if the broadcasting industry employs software to facilitate broadcasting, that is not a basis for refusing Applicant’s Mark. To do so would be a mischaracterization of Applicant’s product and an over-generalization of broadcasting software, which would extend the definition of broadcast to every single type of software that allows for content creation and playback capabilities.

The website that the Examiner cites, <http://spacial.com/sam-broadcaster>, is for the specific purpose of creating one’s own radio station and stream live shows. See attached as Exhibit A, a snapshot of the website. This is significantly different from Applicant’s product in character, function, feature, and purpose. Applicant’s product allows a child to create content that can be uploaded anywhere he or she wants. Applicant’s product is no more a “broadcast” than a built-in camera on a smart phone or photo editing software app. The Examiner’s citation to an online radio station is an over broad and overly-simplified application of the term “broadcast” to Applicant’s

product. The Examiner misstates the Applicant in saying that its goods are for creating videos that can be “disseminated.” The Examiner makes the mistake of equating playing back or uploading with disseminating. Neither “playback” nor “upload” are the same thing as “broadcast.” For example, “playback” is defined as “the act of reproducing a sound or video record, especially in order to check a recording that is newly made” and “upload” is defined as “to transfer (software, data, character sets, etc.) from a smaller to a larger computer.” See attached as Exhibit B definitions for “playback” and “upload.” There is no broadcasting function because a user of Applicant’s product would have no ability to widely disseminate, *e.g.*, sending signals through radio or television, only the ability to playback its recordings and upload onto YouTube. This does not constitute a “broadcast.” Not only does Applicant’s software not broadcast through television or radio, or through a live stream like the website the Examiner cited; the Applicant’s software provides no functionality at all after a child creates and uploads onto YouTube.

IV. Any Doubt Must be Resolved in Applicant’s Favor

Applicant respectfully contends that given the record as a whole, there is at least *some* doubt as to the mere descriptiveness of Applicant’s BRODDCAST mark in connection with its goods. A consumer would have to take several mental steps to understand what BRODDCAST means in connection with Applicant’s product. A consumer would have to first associate the mark BRODDCAST with the word “broadcast” despite its unique and curious spelling. A consumer would then have to understand how Applicant’s product, intended for children, would allow for a broadcasting or dissemination, through means such as television or radio.

Taken as a whole, Applicant’s BRODDCAST mark cannot be deemed merely descriptive because it does not provide for broadcasting capabilities, is not intended for the broadcasting industry, and has nothing to do with what an average consumer conjures up in his or her mind when the wording “broadcast” is mentioned. Applicant’s BRODDCAST mark is incredibly clever in connection with Applicant’s product; it is a whimsical spelling of a word that has multiple meanings,

and has nothing to do with broadcasting, particularly because broadcasting is a function conducted by large media companies and television or radio stations, and not by children using an app to create and playback content.

Applicant's Mark and product give at least some pause as to what exactly the goods are and how it relates to Applicant's Mark, and is therefore not *merely* descriptive. This pause should be resolved in Applicant's favor.

V. Conclusion

For the foregoing reasons, Applicant respectfully contends that Applicant's mark BRODDCAST is not merely descriptive and requests that the Board grant this appeal and allow Application Ser. No. 86/388,876 for the mark BRODDCAST to proceed to publication.

Date: December 24, 2015

Respectfully submitted,

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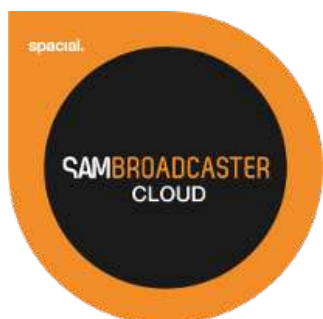
Attorneys for Applicant

EXHIBIT A



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Automation Scheduling

SAM Broadcaster Cloud allows you to upload your content, set rotation rules, tasks and playblocks... and then shut down your computer! You can relax knowing SAM Broadcaster Cloud is keeping your station running 24/7 even if you are not around to operate it. No servers or staff necessary! It's the easiest way to create a radio station.



Live Streaming

Live streaming now allows you to stream live shows using SAM Broadcaster Live DJ. You can use SAM Broadcaster Live DJ connects to your SAM Broadcaster Cloud and allow you to host talk shows or stream live shows or even pre-recorded content easily and automatically using your SAM Broadcaster Cloud streaming configuration. When done, just switch back to SAM Broadcaster Cloud to stream your automated content. Your listeners won't notice the difference. Also, if your live stream drops for any reason the cloud takes over to ensure your station is never down.



START YOUR INTERNET RADIO WITH SAM BROADCASTER

CLOUD

Your radio automation software, from the cloud:

Broadcast LIVE with LIVE-DJ*

Intuitive automation software.

Click “play” and stream.

Stream to your existing
ShoutCast/IceCast/Live365 servers

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Manage multiple DJs and stations.

Customizable web widgets and players.

*Requires Windows XP or Greater



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EXHIBIT B

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Word of the Day

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definitions

playback

playback

[**pley**-bak]

Spell

Syllables

Examples

Word Origin

noun

- the act of reproducing a sound or video recording, especially in order to check a recording that is newly made.
- (in a recording device) the apparatus used in producing playbacks.
- the recording so played, especially the first time it is heard or viewed after being recorded.
- the response to a suggestion, act, product, venture, etc.; feedback:
The playback on the speech has been very favorable.

Origin of playback

1925-30; noun use of verb phrase *play back*

Word of the Day

merrythought



Word Value for playback

21 24

Scrabble Words With Friends

What is the "X" in "Xmas"?



Dictionary.com Unabridged
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Examples from the Web for playback

Contemporary Examples

It was one of those moments that we all watched on *playback* and went, “Ahhh!”

[Game of Thrones' Kit Harington on Jon Snow's Heroism and Loss in the Battle of Castle Black](#)
Marlow Stern
June 8, 2014

Historical Examples

Gentlemen, listen to this *playback* and then I'll have Dr. Forster here go on from there.

[Warning from the Stars](#)
Ron Cocking

I don't know what I said, if anything, and the suit recorder has no *playback* or eraser.

[Accidental Death](#)
Peter Bailly

British Dictionary definitions for playback

playback

/ˈpleɪˌbæk/

cassette
compact disk
companding
digital audiotape
Dolby



Nearby words for playback

playa
playability
playable
playact
playacting
playback
playback-head
playbill
playbook
playboy
playboy-of-the-western-world

noun

1. the act or process of reproducing a recording, esp on magnetic tape
2. the part of a tape recorder serving to reproduce or used for reproducing recorded material
3. (**modifier**) of or relating to the reproduction of signals from a recording: *the playback head of a tape recorder*

verb (adverb)

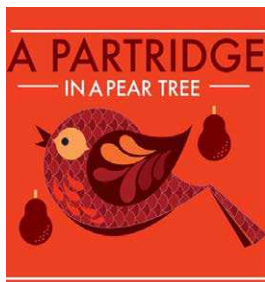
4. to reproduce (recorded material) on (a magnetic tape) by means of a tape recorder

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definitions ☐



upload 

[**uhp**-lohɔ] *Computers.*

Spell

Syllables

Examples

Word
Origin

verb (used with object)

1. to transfer (software, data, character sets, etc.) from a smaller to a larger computer.

noun

2. software, data, etc., that has been uploaded.
3. the act or process of uploading.

Origin of upload



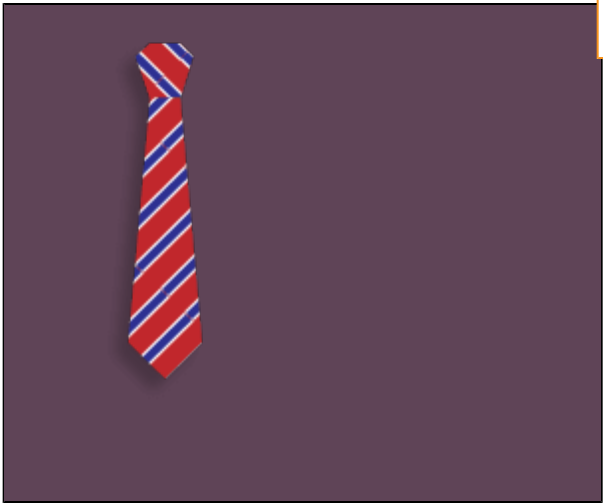
up- + load

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Examples from the Web for upload 

Word of the Day

merrythought



Word Value for upload

012

Scrabble

Words With
Friends

Related Words

ADSL

Contemporary Examples

The Xbox One gives players the ability to *upload* clips of gameplay and record voiceover.

[My Xbox One Won't Let Me Swear](#)
Alec Kubas-Meyer
December 7, 2013

In another, we *upload* our brains, convert them into software, and experience sublime adventures in virtual worlds.

[It's the End of the World but We'll Be Fine](#)
Nick Romeo
May 17, 2013

upload your photo and this Android program will give you yellow skin and slanty eyes.

[Is Google Play's 'Make me Asian' App Racist?](#)
Winston Ross
January 1, 2013



British Dictionary definitions for upload



upload

/ʌpˈləʊd/

verb

1. **(transitive)** to copy or transfer (data or a program) from one's own computer into the memory of another computer *Compare* [download](#) (sense 1)

Collins English Dictionary - Complete & Unabridged 2012 Digital Edition
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podcast
sideload

Nearby words for upload

uplifting
upliftment
uplight
uplighter
uplink
upload
upmail tricia prolog
upmanship
upmarket
upmost
upolu



Word Origin and History for upload



v.

by 1980, from **up** + **load** (v.). Related: *Uploaded*; *uploading*.

Online Etymology Dictionary, © 2010 Douglas Harper

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upload in Science



upload  (ŭp'lōd')

To transfer data or programs from one's own computer or digital device to a server or host computer. Compare **download**.

The American Heritage® Science Dictionary

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upload in Technology



/uhp'lohd/ To transfer programs or data over a digital communications link from a smaller or peripheral "client" system to a larger or central "host" one.

Opposite: **download**.

[[Jargon File](#)]

(1994-10-27)

The Free On-line Dictionary of Computing, © Denis Howe 2010

<http://foldoc.org>

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